

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5462.

SPECIAL CALENDAR.

42

WILLIAM H. LABOFISH, EXECUTOR, APPELLANT,

vs.

SAMUEL LOUIS BERMAN ET AL.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JULY 27, 1931.

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Court of Appeals of the District of Columbia

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INDEX.

	Original	Print
Petition for probate.....	1	1
Caveat	4	3
Answer of William H. Labofish.....	7	6
Order framing issues.....	9	7
Memorandum	11	9
Order aligning parties.....	12	9
Seventh minute entry.....	14	10
Overruling of motion for new trial.....	15	11
Order denying probate.....	21	15
Caveatee's assignments of error.....	24	17
Order to clerk to prepare transcript of record.....	25	18
Certificate	26	19
Notice of submission of bill of exceptions.....	27	20
Bill of exceptions.....	28	21
Will	28	21
Codicil	34	27
Death certificate.....	36	29
Testimony of Louis Berman, David Berman, Anna Carpel, Naomi Berman.....	37	30
Ida Burka, Esther L. Campbell, Max Ber- man	38	31
Harry Hyman, Anna Levine, Morris Ein- binder, Ida Einbinder, Simon Berman, Mary Berman, Dr. John P. H. Murphy..	39	31
Dr. D. Percy Hickling.....	42	35

Court of Appeals of the District of Columbia

No. 5462.

WILLIAM H. LABOFISH, Executor, Appellant,

vs.

SAMUEL LOUIS BERMAN et al.

1 Filed Jun. 28, 1929. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia, Holding a Probate Court.

Administration No. —.

In re Estate of BENJAMIN BERMAN, Deceased.

Petition for Probate.

The petition of Wm. H. Labofish, respectfully shows:

1. That the petitioner is a citizen of the United States and a resident of the District of Columbia, and files this petition as the person named as executor in the last will and testament of Benjamin Berman, deceased.

2. That Benjamin Berman, late a citizen of the United States and a resident of the District of Columbia, departed this life in the District of Columbia, testate, on or about the 21st day of June, A. D. 1929, leaving as his survivors the following named persons, who are his only heirs at law and next of kin, and whose names, residents and relationship are as follows:

Eva Berman, widow, who is committed to St. Elizabeth's Hospital for the Insane, having been adjudicated of unsound mind on the 22nd day of March, 1929.

Samuel Louis Berman, son, 914 Irving Street, Northeast, Washington, D. C.

David Berman, son, 914 Irving Street, Northeast, Washington, D. C.

Naomi Berman, daughter, 3403 R Street, Northwest, Washington, D. C.

Annie Carpel, daughter, 3611 11th Street, Northwest, Washington, D. C.

3. That said decedent at the time of his death was seized and possessed of the following real estate in the City of Washington, District of Columbia, to wit:

Lot 51 in square 275, improved by a brick store, apartments and garages, being 1200 T Street, Northwest, and valued at about \$27,500.00;

2 Lot 41 in square 3535, improved by a brick store and apartment, being 138 U Street, Northeast, and valued at about \$30,000.00.

4. That decedent left personal property valued at about \$2,640.00, as follows:

A note in the sum of \$2,100.00 secured by a second deed of trust on real estate, which said note is held by the Citizens Bank, Takoma Park, Md., D. C., as collateral to secure an indebtedness of decedent in the sum of \$600.00;

Four hundred seventeen (\$417.00) dollars cash in banks; Jewelry and personal effects valued at about \$125.00.

5. That decedent left a last will and testament bearing date the 26th day of September, 1927 and a codicil to said will bearing date the 17th day of September, 1928, which have been filed with the Register of Wills in the District of Columbia for probate and record.

6. That decedent, so far as your petitioner after diligent inquiry has been able to learn, left debts, including expenses incident to his last illness and funeral expenses, amounting to about Twelve Thousand Six Hundred Seventy Five Dollars (\$12,675.00), of which sum, Eleven Thousand Two Hundred Thirty Dollars, (\$11,230.00) consists of mortgages against the real estate aforesaid.

7. That your petitioner is named by the decedent in his said will as the executor thereof and as such believes himself entitled to letters testamentary on said estate.

8. That all the heirs at law and next of kin of said testator are adult persons and reside in the District of Columbia.

Wherefore, the premises considered, your petitioner respectfully prays:

1. That process of this Court issue against said heirs at law and next of kin, no waivers having been signed by any of them consenting to the probate of said will and the issuance of letters testamentary to your petitioner, requiring them to answer the exigencies of this petition.

3 2. That a guardian ad litem be appointed by this Honorable Court to represent the interests of Eva Berman, lunatic, the widow of the decedent.

3. That said will dated September 26, 1927 and codicil thereto dated September 17, 1928 be admitted to probate and record as a will of real and personal estate, as the last will and testament of Benjamin Berman, deceased.

4. That letters testamentary be granted unto your petitioner.

5. For such other or further relief as the nature of the case may require and to the Court may seem just and proper.

WM. H. LABOFISH.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the annexed petition by me subscribed and know the contents thereof; and that the statements of facts therein made as upon personal knowledge are true, and those made as upon information and belief, I believe to be true.

WM. H. LABOFISH.

Subscribed and sworn to before me this 28th day of June, A. D. 1929.

THEODORE COGSWELL,
Register of Wills.

(Endorsement: Petition for Probate. Filed Jun. 28, 1929. Theodore Cogswell, Register of Wills, Clerk of Probate Court.)

4

Caveat.

The petition of Samuel Louis Berman, David Berman, Naomi Berman and Anna Evelyn Carpel, née Berman, respectfully represents unto this Honorable Court:

1. That Samuel Louis Berman and Anna Evelyn Carpel are citizens of the Republic of Poland and David Berman and Naomi Berman are citizens of the United States; all of said petitioners being residents of the District of Co-

lumbia, and are heirs at law and next of kin of Benjamin Berman, being his sons and daughters.

2. That they have notice that a certain paper writing bearing date on the 26th day of September, 1927, with a codicil attached bearing date on the 17th day of September, 1928, was filed in this Honorable Court on the 24th day of June, 1929 as the last will and testament of the said Benjamin Berman, deceased.

3. That their interests will be injuriously affected by the allowance of said pretended will and codicil; that they do hereby contest the probate and validity of said paper writings purporting to be the last will and testament and codicil of the said Benjamin Berman, deceased, and for that purpose allege:

First. The said paper writings are not the last will and testament and codicil of said deceased.

Second. That the said deceased was not, at the time of the making and subscribing or the acknowledging by him of the said alleged will and codicil, of sound mind and memory or in any respect capable of making a will or codicil.

5 Third. The said deceased did not, at the time of making the subscription at the end of said alleged will and codicil, or at the time of acknowledging the same subscription to have been made by him to the attesting witnesses to the said paper writings, declare the said paper writings to be the last will and testament and codicil of him, the said Benjamin Berman.

Fourth. The attesting witnesses to said alleged will and codicil did not, nor did either of them sign his name as a witness to the alleged will and codicil at the request of the said Benjamin Berman.

Fifth. That the said paper writings purporting to be such last will and testament and codicil was obtained and the execution thereof procured by fraud and coercion exercised upon him by some person or persons at this time unknown to the subscribers.

Sixth. They allege that the said paper writings were not freely and voluntarily executed or made as decedent's last will and testament and codicil by said deceased, but that the subscription thereto and the publication thereof by him was procured by fraud, undue influence and coercion exercised upon him by some person or persons at this time unknown to the subscribers.

Wherefore, the premises considered, your petitioners pray:

1. That process may issue from this Honorable Court requiring the parties in interest to answer the exigencies of this petition.

2. That the said paper writings may be refused probate.

3. That issues be framed by the caveators and caveatees of the said alleged will and codicil, to be tried by jury to determine the facts of the alleged will and codicil.

4. That a collector or collectors may be appointed to take charge of the estate of the deceased to serve under bond or undertaking until further hearing from the same.

5. For such other and further relief as to the Court
6 may seem just and proper.

1 SAMUEL LOUIS BERMAN,
2 DAVID BERMAN,
3 NAOMI BERMAN,
ANNA E. CARPEL,

Petitioners.

JAMES B. FLYNN,
S. J. L'HOMMEDIEU,

Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *To wit:*

We do solemnly swear that we have read the annexed petition by us subscribed and know the contents thereof; and that the statements of facts therein made as upon personal knowledge are true, and those made as upon information and belief, we believe to be true.

SAMUEL LOUIS BERMAN,
DAVID BERMAN,
NAOMI BERMAN,
ANNA E. CARPEL,

Petitioners.

Subscribed and sworn to before me this 16th day of July, 1929.

[Seal of Gerald E. Keene, Notary Public, District of Columbia.]

GERALD E. KEENE,
Notary Public, D. C.

My commission expires Nov. 12, 1932.

July 17, 1929.

Copy of the above acknowledged.

WM. H. LABOFISH.

(Endorsement: Caveat. Filed Jul. 17, 1929. Theodore Cogswell, Register of Wills, Clerk of Probate Court.)

7 *Answer of William H. Labofish Named as Executor
and Trustee in the Last Will and Testament of
Above-Named Decedent, to the Caveat Filed
Herein.*

The answer of William H. Labofish, named as executor and trustee in the last will and testament of Benjamin Berman, deceased, to the caveat filed herein, respectfully states as follows:

1-2. He admits the allegations of paragraphs numbered 1 and 2 of said petition for caveat.

3. He denies all of the allegations contained in paragraph 3 of said petition, and avers the facts to be that said paper writing dated September 26, 1927, and the codicil thereto dated September 17, 1928, are, respectively, the last will and testament of said Benjamin Berman, deceased, and codicil thereto; that said last will and testament, and codicil, were each formally executed in the mode required by law; that at the time of the execution of said last will and testament, and of said codicil thereto, the said Benjamin Berman was of sound and disposing mind and memory, and was in every respect capable of making said will and codicil; that neither said last will and testament, nor the codicil thereto, was executed because of any undue influence practiced upon said Benjamin Berman by any person or persons whomsoever, nor was said last will and testament or said codicil procured to have been made, subscribed or published by any fraud, or coercion exercised upon said testator by any person or persons.

8 4. This respondent is willing that issues may be framed and tried before a jury according to law so as to determine the truth of the allegations of the caveat aforesaid. Respondent further says that since some time prior to the death of above named decedent, respondent has acted for said decedent in the matter of the collection of decedent's rents and the handling of decedent's

properties, and is familiar generally with these matters, with the tenants of decedent's real estate and the status of their tenancies; and respondent asks the Court to consider these matters in connection with the appointment of any collector for the estate of said decedent.

WILLIAM H. LABOFISH.

P. H. MARSHALL,

Attorney for William H. Labofish, Caveatee.

DISTRICT OF COLUMBIA, ss:

William H. Labofish, being first duly sworn, on oath says that he is the person named as executor and trustee in the last will and testament, and codicil thereto, of Benjamin Berman, deceased, and that affiant has read the answer to the petition for caveat herein filed, and knows the contents thereof, and has subscribed his name thereto, and that he verily believes the facts set forth in said answer to be true.

WILLIAM H. LABOFISH.

Subscribed and sworn to before me this 22nd day of July, 1929.

[Seal of Nina I. Thomas, Notary Public, District of Columbia.]

NINA I. THOMAS

Notary Public, D. C.

(Endorsement: Answer of William H. Labofish named as Executor and Trustee in the last will and testament of above named decedent, to caveat filed herein. Filed Jul. 23, 1929. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

9

Order Framing Issues.

Upon consideration of the caveat of Samuel Louis Berman, David Berman, Naomi Berman and Anna E. Carpel, and the answer of William H. Labofish, filed herein, it is this 18th day of September, A. D. 1929,

Ordered, That the following issues be and they are hereby framed to be tried before a jury at the next term of Court.

(1) Was the paper writing filed in this Court and bearing date on the 26th day of September, 1927, the last will and testament of Benjamin Berman, deceased? No.

(2) Was the paper writing filed in this Court and bearing date on the 17th day of September, 1928, and alleged to be a codicil to the said last will and testament of said decedent, a codicil of the said Benjamin Berman, deceased? No.

((3) Were the two said paper writings, purporting to be the last will and testament of the said decedent and a codicil thereto of Benjamin Berman, deceased, executed and attested in due form as required by law?)

Withdrawn.

(4) Was the said last will and testament and codicil thereto obtained or the execution thereof procured from the said Benjamin Berman, deceased, by undue influence? No.

Direct verdict.

(5) Was the said last will and testament and codicil thereto obtained or the execution thereof or the subscription thereto procured from the said Benjamin Berman, deceased, by coercion, fraud or duress practiced upon
10 the said Benjamin Berman by any person or persons?

Withdrawn.

(6) Was the said Benjamin Berman, deceased, at the time of the making and subscribing or of the acknowledging by him of the said paper writings of sound and disposing mind and capable of executing a valid deed or contract? No.

(7) Did the said Benjamin Berman, deceased, at the time of making the subscription at the end of the said paper writings or at the time of acknowledging the subscription to the said paper writings declare the said paper writings to be the last will and testament and codicil of him, the said Benjamin Berman?

Withdrawn.

(8) Did the attesting witnesses to the said alleged will and codicil or did either of them sign his name as a witness to the said alleged will and codicil at the request of or with the acquiescence — the said Benjamin Berman?

Withdrawn.

WENDELL P. STAFFORD,
Justice.

NOTE.—Counsel for proponents excepts to issues Nos. 1, 2 and 7, as framed.

WENDELL P. STAFFORD,
Justice.

(Endorsement: Order framing Issues. Filed Sep. 18, 1929. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

11 *Memorandum, January 27, 1931.*

Issues certified for trial by jury in attendance upon Circuit Court No. Two, holding a special term as a Probate Court for the trial of will contests—Mr. Justice Siddons presiding.

12 Filed Jan. 27, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia, Holding
a Probate Court.

Adm. No. 39076.

In re Estate of BENJAMIN BERMAN, Deceased.

Order Aligning Parties.

It is ordered by the Court this 27th day of January 1931, that upon the trial of the issues framed herein, the caveators shall be plaintiffs and the caveatee defendant.

F. L. SIDDONS,
Justice.

(Endorsement: Order aligning parties. Filed Jan. 27, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

13 Filed Feb. 5, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Thursday, February 5, 1931.

Mr. Justice Siddons presiding.

No. 39076, Adm. Doc. 86.

In re Estate of BENJAMIN BERMAN, Deceased.

(Caveators) Plaintiffs

vs.

(Caveatee) Defendant.

Now come here again the parties aforesaid and the same jury that was respited yesterday; whereupon the jury,

after the case is given them in charge, upon their oath say:

In answer to the *First Issue*:

Was the paper writing filed in this Court and bearing date on the 26th day of September, 1927, the last will and testament of Benjamin Berman, deceased?

They answer "No".

In answer to the *Second Issue*:

Was the paper writing filed in this Court and bearing date on the 17th day of September, 1928, and alleged to be a codicil to the said last will and testament of said decedent, a codicil of the said Benjamin Berman, deceased?

They answer "No".

Third Issue withdrawn.

In answer to the *Fourth Issue*:

Was the said last will and testament and codicil thereto obtained or the execution thereof procured from the said Benjamin Berman, deceased, by undue influence.

They answer "No".

Fifth Issue withdrawn.

In answer to the *Sixth Issue*:

Was the said Benjamin Berman, deceased, at the time of the making and subscribing or of the acknowledging by him of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract?

They answer "No".

Seventh Issue withdrawn.

Eighth Issue withdrawn.

14

Docket Entry.

1931, Feb. 5. Verdict setting aside Will. (Issues 3, 5, 7 & 8 withdrawn.)

Proceedings before Circuit Court No. Two of the Supreme Court of the District of Columbia, Holding a special term as a Probate Court for the trial of will contests, Mr. Justice Siddons presiding.

FRANK E. CUNNINGHAM,

Clerk.

FRED C. O'CONNELL,

Asst. Clerk.

(Endorsement: Seventh Minute Entry. Verdict Setting Aside Will. Filed Feb. 5, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

15

Memorandum.

1931, Feb. 20. Motion for new trial filed.

On Submission After Argument and Briefs on Caveatee's Motion for a New Trial.

Memorandum.

Among the grounds of the motion for a new trial that have been most earnestly urged is the third, which alleges that

“the Court committed error in admitting in evidence over objection and exception, the death certificate of Benjamin Berman, as to the cause of death.”

In support of the contention there was cited cases decided by the Court of Appeals, beginning with the opinion reported in 5 App. 30. There are five opinions in which the Court of Appeals has dealt with the subject, the latest being reported in 44 App. at page 120.

Each of these opinions has been carefully considered by the Court and even if good taste permitted criticism by this Court of the conclusions reached by that Court, it would not do for this Court to indulge in *adverse* criticisms of the conclusions reached by the Court of Appeals in the cases mentioned. But we may be permitted to say that in each of the cases the Court of Appeals announced conclusions which are abundantly supported by nearly the whole current of judicial decisions.

In each of the cases before the Court of Appeals, they reversed the trial Court wherever it appeared that under the exception to the hearsay rule which is involved in all of them, hearsay *upon hearsay* had been admitted. Where the trial

16 Court had excluded the evidence because it was hearsay *upon hearsay*, the Appellate Court affirmed the action of the trial Court.

In the pending case one of the material questions was the cause of the death of the decedent Benjamin Berman, and a certified copy of the record, furnished by the municipal offi-

cial who is the custodian of such records, was offered and received in evidence. The certificate was made by the physician in professional attendance upon the decedent, and in the certificate he states the cause of death to be "Coronary thrombosis". It is the language of the Court of Appeals on page 125, in the case cited in 44 Appeals, that is the basis of the exception to the admission of the certificate, that language being "the death certificate was not evidence and it could not be made evidence indirectly." The Court comes back to this matter later in this memorandum.

Prior to April 24, 1880, certain health ordinances and regulations then in force in the District of Columbia were, by an Act of Congress approved April 24, 1880, legalized. Among these regulations was one that had been formulated by the health department of the District of Columbia for the purpose of securing a full and correct record of vital statistics, and it provided that it should be the duty of a physician attending a person during his or her last sickness, or of the coroner of the District, when the case came under his official notice, to furnish and deliver to the undertaker, or other person superintending the burial of the deceased person, a certificate, duly signed, setting forth a number of required facts, these including the cause, date, and place of death and the duration of the last illness of such person. The certificate thus required, in addition to other requirements, had to be forwarded by the undertaker to the register of such records within 24 hours after death had taken
17 place, with the proviso that in case of death from any infectious or contagious disease, the certificate should be forwarded within 8 hours after the death. The failure to obey these requirements was punished by the penalty prescribed by another section of the regulations legalized as stated above—the imposition of a fine of not less than \$25 or more than \$200 for each and every such offense.

The cases in the Court of Appeals for the District of Columbia, cited in support of the contention that the death certificate is not admissible as evidence of the cause of death, are the following:

Prigg v. Lansburgh, 5 App. D. C. 30, 35, 36. One of the questions in that case was whether the lower Court erred in excluding so much of the record entry in the complaint book at Police Headquarters as showed that the appellees

were entered as complainants therein. The statute provided that these books should be kept,

“and that therein ‘shall be entered every complaint preferred upon *personal knowledge* of the circumstances thereof, with the name and residence of the complainant’ (p. 35). * * * The officer who produced the book was examined by plaintiff, and testified that he made the entry of the charges; that Raff brought in the prisoner and dictated the entries; that witness had no personal knowledge and all the entries were based upon statements made by Raff to him at the time. * * * Where the entry of the name of a complainant or private prosecutor is made in this book upon the statement of a third person, when he is not present and is not shown to have confirmed or ratified it, it is no more admissible against him than other hearsay evidence would ordinarily be” (p. 36).

National Union v. Thomas, 10 App. 277, 291, 292. In that case the record offered in evidence was that of the coroner and was not admitted because it was not such a record as was required by the law, the Court declaring that

18 “The record offered in evidence was not that of an inquest held in due course of law. No jury was summoned, and yet the verdict of a jury, regularly empaneled in accordance with law, is the essential foundation of a coroner’s finding and efficient official record” (p. 292).

The Court said in the course of its opinion on this point:

“We are not called upon to decide whether, in a case like this, the verdict of a coroner’s jury approved and entered of record by him in his official capacity, would be admissible as evidence of the manner and cause of death. That such a record is competent evidence has been held by the Supreme Court of Illinois. U. S. Life Ins. Co. v. Vocke, 129 Ill. 557” (291).

Snell v. The United States, 16 App. 501, 516. This case involved the question of the admissibility of certain extracts from, or copies of entries made in the books of the Georgia State Sanitarium. The Court said:

“It is very manifest that from the nature and character of the entries themselves they were based upon report and mere hearsay, at least, as to all such portion of the entries that related to the parties before they were received into the institution. When and by whom the entries were made does not appear, nor does it appear that they were made by and according to any legal requirement” (516).

Levy v. Vaughan, 42 App. 146, 154. In this case the certificate was signed by the coroner as attending physician when as a matter of fact

“the coroner was not in attendance upon the patient. He did not make the autopsy, and his information regarding the cause of death was hearsay” (p. 154).

His statement was hearsay and it was told to him by third parties and therefore was hearsay *upon hearsay*.

“He had no direct knowledge of the facts, but certified upon information derived from others. Moreover, the certificate was not an official certificate as coroner, but a formal requirement of the health department, of *attending* physicians, where there has been no occasion for an inquest; and its apparent purpose is to furnish statistical information” (p. 154).

District of Columbia v. Washington, 44 App. 120, 125
In this case the coroner was called as a witness and

19 “he testified that the death certificate issued at the time of the intestate’s demise *was in his handwriting*, and he then was asked ‘what reason was assigned by him as the cause of death.’ The Court sustained plaintiff’s objection to this question, and the ruling here is assigned as error. The question then at issue was, What occasioned the death? The death certificate was not evidence, and it could not be made evidence indirectly. The witness properly might have been asked to state his means of knowledge, and then his opinion as to the cause of death. But that was not done.”

In the pending case the certificate was received in evidence as a record required to be kept by an express Act of Congress and the certificate to be made by the physician

was, by the same act, in terms required to state the time, place and cause of death. As we have seen, the certificate contained the required statement of a physician having personal knowledge of the fact, being the physician in professional attendance upon the decedent, Benjamin Berman. The language of the Court of Appeals in 44 App. 125, quoted above, is, as the Court reads it and the whole of the opinion in the case, a limitation upon the use of these certificates where it is obvious that it presents a case of hearsay *upon hearsay*. All of the exceptions to the hearsay rule are of hearsay evidence, and as to all of them it has been repeatedly held that in a case which shows that the evidence offered under one or the other of the exceptions is hearsay *upon hearsay*, the evidence will *not* be received, and this settled rule, the Court of Appeals, in the series of opinions reviewed herein, clearly has applied. The pending case, however, presents no question of hearsay *upon hearsay*, but does, in the opinion of this Court, present a case of hearsay evidence which is admissible under that exception to the hearsay rule which was invoked by the Caveator.

The remaining grounds for a new trial the Court is of the opinion are without merit, and are not, therefore,
20 further discussed in this memorandum.

The motion for a new trial is overruled, and it is so ordered.

April 25, 1931.

F. L. SIDDON, *Justice.*

(Endorsement: Memorandum of Court overruling Motion for new trial. Filed Apr. 25, 1931. Theodore Cogswell, Register of Wills D. C., Clerk of Probate Court.)

21 *Order Denying Probate of Purported Last Will and Testament and Codicil.*

This cause, coming on to be heard upon the petition of William H. Labofish praying for the admission to probate and record of certain paper-writings dated the 26th day of September, 1927, and the 17th of September, 1928, and purported to be the last will and testament of Benjamin Berman, deceased, and a codicil to said last will and testament, respectively, and against which were filed caveats, and upon the pleadings thereon, and the verdict of the jury rendered

upon the trial of the issues heretofore had thereon and directed to be tried by a jury; and, it appearing to the Court from the record of the said trial that by the said verdict the said jury did hereupon return a verdict upon the issue, "Was the paper-writing filed in this Court and bearing date on the 26th day of September, 1927, the last will and testament of Benjamin Berman, deceased?" and the answer of the jury was, "No"; and it further appearing to the Court that upon the issue, "Was the paper-writing filed in this Court and bearing date on the 17th day of September, 1928, and alleged to be a codicil to the said last will and testament of the said decedent, a codicil of the said Benjamin Berman, deceased?" and the answer of the jury was, "No"; and it further appearing to the Court that upon the issue, "Was the said Benjamin Berman, deceased, at the time of the making and subscribing or of the acknowledging by him of the said paper-writings, of sound and disposing mind and capable of executing a valid deed or contract?" and the answer of said jury was, "No"; and, 22 it further appearing to the Court that the motion for a new trial filed herein on behalf of the caveatee was overruled on the 25th day of April, 1931, it is by the Court this 29th day of April, 1931,

Adjudged, ordered and decreed, that the prayers of the petition of William H. Labofish for the probate and record of the paper-writings filed in this cause, purporting to be the last will and testament and codicil of the said Benjamin Berman, deceased, be, and the same are hereby denied; that the paper-writing dated the 26th day of September, 1927, purporting to be the last will and testament of the said deceased, and the paper-writing dated the 17th day of September, 1928, purporting to be a codicil to the said purported last will and testament of the said deceased, be, and the same hereby are denied probate and record as such will and testament and codicil of the said Benjamin Berman, deceased, and that the said Benjamin Berman died, intestate.

WENDELL P. STAFFORD,
Justice.

From the foregoing decrees the Caveatees note- an appeal to the Court of Appeals and the cost bond is set at \$100, or \$50 cash deposit.

WENDELL P. STAFFORD,
Justice.

P. H. MARSHALL,
R. WELLFORD,
Atty-. for Caveatee.

A Supersedeas Bond is set in the amount of \$5,000.00.

WENDELL P. STAFFORD,
Justice.

(Endorsement: Order denying probate of purported last will and testament and codicil. Filed Apr. 29, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

23

Memorandum.

Apl. 29, 1931.—Appeal noted in open Court, and Undertaking for costs fixed at \$100, or Cash deposit of \$50. Supersedeas Undertaking fixed at \$5000.

Memorandum.

May 12, 1931.—Undertaking for Costs (\$100) approved and filed.

24

Caveatee's Assignments of Error.

The trial Court committed error as follows:

1. In admitting in evidence, over the objection and exception of counsel for caveatee, the death certificate of Benjamin Berman.

2. In overruling objection to the hypothetical question propounded to Dr. John P. H. Murphy on his direct examination, which objection was upon the ground that there was no legally sufficient evidence as to the cause of death of Benjamin Berman.

3. In sustaining the objection to cross-examination of Dr. John P. H. Murphy as to matters not included in the hypothetical question asked said witness on his direct examination, but testified to by certain of the caveators.

4. In sustaining the objection of counsel for caveators to permitting Dr. Samuel Benjamin to testify as to his contacts with, and observations of Benjamin Berman, deceased, and as to witness's opinion as to the mental condition of said Benjamin Berman.

RICHARD E. WELLFORD,
P. H. MARSHALL,
Attorneys for Caveatee.

Service by copy acknowledged May 14, 1931.

S. J. L'HOMMEDIEU,
JAMES B. FLYNN,
Attorneys for Caveators.

(Endorsement: Caveatee's Assignments of Error. Filed May 14, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

25 *Order to Clerk to Prepare Transcript of Record.*

Clerk of Probate Court:

Please prepare transcript of record on appeal to Court of Appeals in above case, to include the following:

1. Petition for probate of will and codicil.
2. Answer and caveat thereto.
3. Answer to petition for caveat.
4. Order framing issues.
5. Memorandum of certification of issues for trial by jury.
6. Order aligning parties.
7. Verdict, (second trial).
8. Memorandum of motion for new trial, overruling thereof, and opinion of Justice Siddons.
9. Order denying probate.
10. Memorandum of noting of appeal in open Court, and fixing of undertaking.
11. Memorandum of filing of undertaking for costs.
12. Caveatee's bill of exceptions.

13. Caveatee's assignment of errors.

14. This designation.

RICHARD E. WELLFORD,
P. H. MARSHALL,
Attorneys for Caveatee.

To Messrs. James B. Flynn and
Samuel J. L'Hommedieu,
Counsel for Caveators:

Please take notice that we have this day filed the foregoing designation of record on appeal in the above case.

RICHARD E. WELLFORD,
P. H. MARSHALL,
Attorneys for Caveatee.

Service by copy acknowledged May 14, 1931.

JAMES B. FLYNN,
S. J. L'HOMMEDIEU,
Attorneys for Caveators.

(Endorsement: Order to Clerk to prepare Transcript of Record. Filed May 14, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.)

26

Form No. 82.

Supreme Court of the District of Columbia, Holding a
Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Theodore Cogswell, Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify the foregoing pages, numbered from 1 to 25, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 39,076 estate of Benjamin Berman, deceased, wherein William H. Labofish, Executor, is appellant and Samuel Louis Berman et al. are appellees, the same constituting a full, true and correct transcript of record of proceedings had in said cause according to the Designation of counsel filed therein and made a part hereof.

I further certify that the bond for appeal, in the penalty of One Hundred dollars, was duly filed by said appellant,

and approved by said Court on the 12th day of May, A. D. 1931.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Probate Court this 22nd day of July, A. D. 1931.

[Seal Supreme Court of the District of Columbia,
Probate Jurisdiction.]

THEODORE COGSWELL,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

27 Filed May 14, 1931. Theodore Cogswell, Register of
Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia, Holding
a Probate Court.

Administration No. 39076.

In re Estate of BENJAMIN BERMAN, Deceased.

Messrs. James B. Flynn and
Samuel J. L'Hommedieu,
Attorneys for Caveators:

Please take notice that the within Bill of Exceptions will be submitted to the Court for settlement or approval, on the 9th day of June, 1931, at 10:00 o'clock a. m. or as soon thereafter as counsel can be heard.

RICHARD E. WELLFORD,
P. H. MARSHALL,
Attorneys for Caveatee.

Service of the foregoing notice and Bill of Exceptions, by copy, acknowledged this 14 day of May, 1931.

JAMES B. FLYNN,
S. J. L'HOMMEDIEU,
Attorneys for Caveators.

28 In the Supreme Court of the District of Columbia,
Holding a Probate Court.

Administration No. 39076.

In re Estate of BENJAMIN BERMAN, Deceased.

Caveatee's Bill of Exceptions.

Be it remembered that this cause came on for trial upon the issues framed herein on the 27th day of January, 1931 before Mr. Justice Siddons and a jury duly sworn and empanelled to try the issues aforesaid, and thereafter was further proceeded with, and upon the trial of said issues the following testimony was offered and proceedings had:

On behalf of caveatee, the attesting witnesses to the will and codicil of Benjamin Berman, deceased, were duly sworn and examined, and testified in substance that they identified the signatures of said Benjamin Berman to the will and codicil aforesaid, and the signatures of the attesting witnesses thereto; that said testamentary papers were signed by the testator in the presence of said witnesses, who attached their signatures as attesting witnesses at his request, in his presence, and in the presence of each other; that he stated that the papers aforesaid were, respectively, his will, and a codicil thereto. Whereupon, said last will and testament and codicil were offered and received in evidence, and are in the words and figures following:

"Last Will and Testament of Benjamin Berman.

"I Benjamin Berman, of the City of Washington, District of Columbia, being of sound and disposing mind, knowing full well the uncertainty of life and the certainty of the end thereof, do make, publish, and declare this, my Last Will and Testament, in duplicate originals, consisting of
29 six typewritten pages, hereby revoking, annulling
and making void all other and former wills, codicils
and testamentary dispositions by me at any time
heretofore made.

"Article I.

"I direct my executor and trustees, hereinafter named, after the payment of all of my just debts, obligations,

funeral and testamentary expenses, and the settlement of all claims and demands against me, being of any and all kinds whatsoever, to dispose of all of my property, real, personal and mixed, of whatsoever kind, character or description and wheresoever situate, in the manner hereinafter more fully set forth.

“Article II.

“Be it known that I am the owner in fee of real estate in the City of Washington, District of Columbia, located at 1200 Tea Street, Northwest and 138 You Street Northeast; that I own also a place of business including fixtures, stock-in-trade and accounts at 1200 Tea Street, Northwest, and sundry other personal properties of miscellaneous value.

“Article III.

“I direct my executor, so soon after my decease as may be proper, to procure and have erected at the head of my grave, a suitable stone memorial, at a cost of not less than \$100.00 nor more than \$250.00, and to provide for the perpetual care of my grave.

“Article IV.

“I recognize the fact that I have living, my beloved wife, Eva, and two sons and two daughters by my said wife, to wit: Samuel Louis Berman; David Berman; Naomi Berman, wife of my son-in-law Simon Berman, and Annie Carpel, wife of my son-in-law Harry L. Carpel, all of whom are adult beings, physically and mentally fit, and capable of providing for themselves.

“Article V.

“I have full and complete knowledge and recollection of all of the facts and circumstances surrounding my aforesaid sons and daughters, their manner and mode of
30 life, their habits and thought, and their feelings and intentions respecting me and my estate. Be it known that they have had and shown for me and my beloved wife, an utter lack of filial love and affection, and a total want of tenderness for their parents in their hours of labor and dis-

tress. Not only have they failed and refused to lend help and assistance to their parents in the preservation of their home and in the accumulation of this estate, but they have consistently hindered, obstructed and embarrassed them in the same. They have heaped abuse upon their parents by their incivility, and in numerous ways and by divers means have ill-treated, insulted and dishonored them. They have failed to accord to their father and mother the respect and veneration that was their due. They have hurt and injured—particularly my son, David—their disordered and ailing mother and have denounced and villified their aged father. They have lightly esteemed the fatherly advice that has been bestowed upon them and have wasted the substance that was provided for their progress and advancement. None of them has in any wise attempted to reconcile themselves with me, their father, nor shown for their declining mother any sense of compassion or sentiment. By all their several ways and means they have broken my health and my spirit, and it is meet and proper that I should provide for them from my bounty after my demise in proportion as they have afflicted me during my life. Out of my benevolence therefore, I give and bequeath unto each of my aforesaid sons and daughters the sum of One Dollar, to the end that they may the better and the longer keep in mind and remembrance their many transgressions and misdoings.

“Article VI.

“I am confronted with the condition that my beloved wife, Eva, for more than nine years last past, through the derelictions of one of my aforesaid sons, has irretrievably lost her mind, memory and understanding, and is now and is
31 expected always to be a hopeless invalid, unable properly to conduct her affairs. Throughout her disability I have provided for her welfare and I feel the necessity of providing and caring for her throughout the term of her natural life and in a manner that I myself should do if living, rather than to depend for such provision upon her children or those upon whom she may be thrust by force of circumstances occasioned by my death. It is my will, therefore, that my trustees, hereinafter named, out of this, my estate, provide for the maintenance, support, health, enjoyment and well-being of my said wife, so far as the same

may be possible and in accordance with the terms of the trust hereinafter created.

“Article VII.

“I hereby nominate, constitute and appoint William H. Labofish an Attorney at Law of the District of Columbia, the executor of this, my Last Will and Testament, and the said William H. Labofish and my son-in-law Simon Berman the trustees of my estate, and direct that they give suitable bond to be fixed by the Probate Court of the District of Columbia for the full, prompt and faithful performance of their duties according to the tenor of the whole of this instrument, as herein provided and as hereinafter more fully set forth.

“Article VIII.

“I give, devise and bequeath unto my said trustees, as such trustees, the whole of my estate whatsoever in its entirety, including all after-acquired property of which I may be seized or possessed at the time of my death, to have and to hold the same unto, and to the only uses and benefits, as follows:

“(a) That my said trustees shall have power to collect and receive the incomes, rents, issues and profits arising from my said properties, and to collect and receive any other assets forming a part of the corpus of my estate.

32 “(b) That with said income and funds they shall take all needful steps and make all disbursements necessary for the care and preservation of my estate, and for the payments of all insurance, taxes, water rents, and general and special assessments if any, and perform any and all services incident to the legal ownership of said properties as I myself should do if living.

“(c) That if, at any time, it shall seem necessary and advisable and for the benefit of the estate herein, to dispose of by sale or transfer, or to in any wise encumber the said properties, the same shall be accomplished by my said trustees, under the direction of and by virtue of authority from the probate branch of the Supreme Court of the District of Columbia, and in such event the trust fund thus created or the proceeds derived shall be invested in mort-

gage securities on District of Columbia properties or in such bonds or other securities as may be approved by the Court.

“(d) I further direct and authorize my said trustees, during the natural life of my beloved wife, Eva, to employ so much of the income arising from my said estate as may be proper and necessary, for the care, maintenance, support, welfare, health and enjoyment of my said wife, commensurate with her needs and station in life, and with due regard and consideration for my feelings toward her. And the said trustees shall provide for all necessary advances to be made out of my estate for the maintenance and support of my said wife, during the period of probate. I believe the above provision to be more beneficial to my said wife than an assignment of dower, and the same is intended in bar of dower in lands or shares of the personal estate.

“Article IX.

“It is my further will, that after the decease of my beloved wife, the trustees herein shall dispose of the corpus of my estate in whatsoever condition the same may be, in the following manner, to wit:

33 “(a) That they shall procure and have erected at the head of my said wife’s grave, and beside my own, a suitable stone to her memory at a cost equal to that of my own, and provide for the perpetual care of said grave.

“(b) That, as soon as may be convenient with respect to the condition of the estate, after my said wife’s decease, they shall deliver to my son-in-law, Simon Berman, as a token of my esteem and in consideration of the service he rendered unto me in time of need, the sum of One Thousand Dollars, to be his absolutely and forever, and free of any condition or restraint.

“(c) That all income derived from the rents and profits of my estate or from the proceeds of any investments, after payment of all expenses incident hereto, shall be distributed, share and share alike, at such periods and intervals as may be convenient but at least once every year, and without ac-

crued interest, to the following charitable organizations and institutions:

Jewish Old Age Home, of Washington, D. C.

Hebrew Relief Society, of Washington, D. C.

Jewish Foster Home, of Washington, D. C.

Jewish Ladies Aid Society, of Washington, D. C.

Jewish Consumptive Hospital, of Denver, Colorado.

“Article X.

“It is my further will that should the Court, by reason of any circumstance, appoint a committee of the person and estate of my demented wife, and should dower in my properties be assigned to her in lieu of her taking under the provisions of the trust herein created, that the remainder of the provisions of the trust be carried out by my said trustees as hereinbefore set forth.

“Article XI.

“It is my further will that should my said wife predecease me, then, and in that event, the sum total of the provisions of this trust, exclusive of the benefits created for her, shall be carried out by my said trustees as hereinbefore set forth.

34 “In witness whereof, I have hereunto subscribed my name and affixed my seal at Washington, in the District of Columbia, this 26th day of September, A. D. Nineteen hundred and twenty-seven, in the presence of the undersigned, whom I have requested to become attesting witnesses hereto.

BENJAMIN BERMAN. [SEAL.]

“The foregoing instrument was subscribed, sealed, published and declared by Benjamin Berman as and for his Last Will and Testament, in our presence and in the presence of each of us, and we, at the same time, at his request, in his presence and in the presence of each other, hereunto subscribe our names and residences as attesting wit-

nesses, this 26th day of September, A. D. Nineteen hundred and twenty-seven.

EDWARD ZUPNIK,

Address: 464 Pa. Ave. N. W., Washington, D. C.

SAMUEL W. WOLFSHEIMER,

Address: 464 Pa. Ave. N. W., Washington, D. C.”

“Codicil to Will of Benjamin Berman.

“I, Benjamin Berman, of Washington, District of Columbia, declare this to be a first codicil to my will dated the 26th day of September, A. D. Nineteen hundred and twenty-seven.

“Whereas, by my said will I have nominated, constituted and appointed William H. Labofish, an Attorney at Law of the District of Columbia, and my son-in-law, Simon Berman, the trustees of my estate the same appearing in Article VII of said will, and,

“Whereas, upon maturer reflection I consider it inadvisable to have said Simon Berman act as co-trustee;

J P L, R E W, B B, as to correction.

“Now, therefore, I hereby nominate, constitute and appoint the said William H. Labofish to be the sole trustee of my said estate, in addition to being the executor of my last will and testament of September 26, 1927, and to carry out completely all the details of the trust therein set forth.

J P L, R E W, B B, as to correction.

35 “I further direct that the bible, or biblical scroll, belonging to me and bearing my name, which is of great value, and located at a Hebrew church at 4th and M Streets, Northwest, in the City of Washington, District of Columbia, be presented to the National Museum at Washington, District of Columbia, to be there kept upon display.

“In all other respects I confirm my said last will and testament of September 26th, 1927.

“In witness whereof, I have hereunto subscribed my name and affixed my seal, at Washington, in the District of Columbia, this 17 day of September, A. D. Nineteen hundred and twenty-eight, in the presence of the under-

signed, who I have requested to become attesting witnesses hereto.

BENJAMIN BERMAN. [SEAL.]

“The foregoing instrument was subscribed, sealed, published and declared by Benjamin Berman as and for his codicil to his last will and testament of September 26, 1927, in our presence and in the presence of each of us, and we, at the same time, at his request, in his presence and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses this 17 day of September, A. D. 1928.

R. E. WELLFORD,
Address: Insurance Bldg.
JOHN P. LABOFISH,
Address: Insurance Bldg.”

Whereupon caveatee rested.

Thereupon, counsel for caveators announced that they withdrew from the consideration of the jury, issue No. 3.

Thereupon caveators, to maintain the issues upon their part joined, offered evidence tending to prove that said Benjamin Berman, at the time of the execution by him of his aforesaid last will and testament and codicil thereto, was not of sound and disposing mind and was not capable of executing a valid deed or contract.

36 For the purpose of proving the cause of death of said Benjamin Berman, counsel for caveators offered in evidence a certified copy of a death certificate of one Benjamin Berman, to which offer objection was made by counsel for caveatee upon the ground that the certificate aforesaid was hearsay, and was not within any of the exceptions to the hearsay rule, and because the physician who purported to sign said death certificate could not be examined as a witness, the testimony of said physician being inadmissible by virtue of the provisions of Sec. 1073 of the Code of Law for the District of Columbia. But the Court overruled said objection, to which ruling exception was duly noted by counsel for caveatee and allowed by the Court, and admitted said certificate in evidence, the same being in the words and figures following:

"Transcript No. 43675.

Health Department of the District of Columbia.

L. R.

A Transcript from the Record of Deaths.

Certificate of Death District of Columbia	No. of record 321484
Full instructions for the guidance of those using this blank and space for remarks may be found on the other side	
1 PLACE OF DEATH: No. 708 Otis Pl., N. W. [Street]† Section Name of Hospital..... Duration of residence therein..... FULL NAME BENJAMIN BERMAN (a) Residence No. Same..... Street..... Length of residence in D. of C. 25 yrs. mos. ds. How long in U. S., if of foreign birth? yrs. mos. ds.	
PERSONAL AND STATISTICAL PARTICULARS 3 SEX 4 Color or race 5 Single, married, widowed, or divorced (write the word) Male W Married 5A If married, widowed, or divorced HUSBAND of Eva Berman (or) [WIFE of]† 6 DATE OF BIRTH (month, day, and year) 7 AGE Years Months Days If less than 1 day..... hrs..... or min..... 62 37 8 OCCUPATION OF DECEASED (a) Trade, profession or particular kind of work..... Retired (b) General nature of industry, business or establishment in which employed (or employer)..... (c) Name of employer..... 9 BIRTHPLACE (city or town) (State or Country) RUSSIA PARENTS 10 NAME OF FATHER (in full) Morris N. Berman 11 BIRTHPLACE OF FATHER (city of town)..... (State or country) RUSSIA	MEDICAL CERTIFICATE OF DEATH 16 DATE OF DEATH (month, day, and year) 6/21, 1929 17 I HEREBY CERTIFY that I attended deceased from 6/13, 1929, to 6/21, 1929, that I last saw him alive on 6/21, 1929 and that death occurred on the date stated above, at 1.50 a. m. The CAUSE OF DEATH* was as follows: Coronary Thrombosis (duration) yrs..... mos. 18 ds. CONTRIBUTORY Pulmonary Edema (Secondary) 15 min. (duration) yrs..... mos. ds. 18 Where was disease contracted, if not at place of death? Did an operation precede death? no Date of operation Was there an autopsy? no What laboratory test confirmed diagnosis? (Signed) Samuel Benjamin, M. D. (Address) 3532 Conn. Ave.
*State the DISEASE CAUSING DEATH, or in deaths from VIOLENT CAUSES, state (1) MEANS AND NATURE OR INJURY, and (2) whether ACCIDENTAL, SUICIDAL, OR HOMICIDAL. See reverse side for additional space.	

[†Words enclosed on brackets erased in copy.]

12 MAIDEN NAME OF MOTHER (in full) Rachael Chesivoir	19 Place of burial, cremation, or removal DATE Eversovetgrad Cemetery, 6/2. 1929
13 BIRTHPLACE OF MOTHER (city or town)..... (State or country) RUSSIA	20 Undertaker Address B. Danzansky 3501 14 St., N. W.
14 Above information furnished by (Address).....	
15 Relation of informant to decedent	

Remarks:.....
Correct, O'L.—J. H. M. Washington, D. C., Feb'y 1st, 1930.
The foregoing is a true and correct copy of a certificate of death on file with the Health Department of the District of Columbia, and duly recorded in the records of said Department.
[Seal District of Columbia Health Department.]
E. J. SCHWARTZ, M. D.
Assistant Health Officer, District of Columbia.
Attest: ARTHUR G. COLE,
Chief Clerk."

No testimony or evidence other than the certificate last aforesaid was received as to the cause of death of said Benjamin Berman. Caveators offered to prove the cause of death of decedent by the testimony of Samuel Louis Berman, one of the sons of decedent, but upon objection being interposed by the Caveatee, the Court refused to allow him to testify as to the cause of death of decedent on the ground that the same would be hearsay.

Among the witnesses who testified on behalf of caveators were **Louis Berman** and **David Berman**, sons of Benjamin Berman, deceased, and **Anna Carpel** and **Naomi Berman**, daughters of said decedent, and all children of said decedent. Each of said witnesses on direct examination, testified that said Benjamin Berman, during the years of 1927 and 1928, was in poor health, complained of dizziness, headaches and pains in the chest and specks before his eyes; that his face was splotched; that he was subject to fainting attacks; that he was engaged in the grocery business and would swear at customers without any apparent reason; that he accused his mother and wife

of robbing him without the slightest apparent justification therefor, and cursed his mother while on her death bed and also at the cemetery during her burial; that he mumbled and threatened to kill himself; that he refused medical treatment—at this time he was worth approximately \$50,000.00; that he accused his children of trying to poison him; that the charges against his children contained in his last will were all untrue; that he was excitable and irritable; could not read or write; that he refused to take his mother, who was eighty-six years of age, into his house, but compelled her to stay on a side porch of the house at 10:30 p. m. with no place to go although he had room for her in the house; that he was unable to discuss current events; that he had never given anything to charity in his lifetime; that the religious scroll mentioned in the codicil to his will had been given by him to the Jewish synagogue long before the execution of the will; that he died within two years after the execution of the will; that all of his children helped him in his store without receiving compensation and one of them worked in his father's store from early boyhood until he reached the age of 39 without pay although he received his room, board, clothing, and spending money of about \$2.00 a week; and that when salesmen would call upon decedent about business, he would curse them and drive them out of the store; that each of said witnesses was of the opinion that at the time of the making of the will and codicil involved herein, said Benjamin Berman was of unsound mind. Other witnesses who testified that the decedent was of unsound mind and gave their reasons therefor were the following: **Ida Burka, Esther L. Campbell,**

39 **Max Berman,** a brother of decedent, **Harry Hyman, Anna Levine, Morris Einbinder, Ida Einbinder, Simon Berman,** son-in-law and legatee under the will in question, and **Mary Berman.** On cross-examination said **Louis Berman, David Berman** and **Mary Berman,** daughter-in-law, each testified in substance, that during the years 1927 and 1928, said Benjamin Berman was, at times of sound mind, and knew and understood what was going on around him and what was said to him, and at other times he was not and did not.

Among the witnesses called on behalf of caveators was **Dr. John P. H. Murphy,** who having been first duly sworn,

was examined and testified as to his professional qualifications as a physician and alienist, and thereupon was asked the following hypothetical question:

“A man who was about 62 years of age in September, 1927, and 63 in September, 1928, of the Jewish race, who was in poor health and feeble physically and who complained of dizziness, headache, specks before his eyes, pain in chest, subject to fainting attacks and whose face was splotchy, and who had a wife and four children, who had been respectful and obedient children, one of whom had worked for him from the time he was 16 until he reached the age of 39, in his grocery store, without receiving any wages therefor; and suppose the same man was engaged in the grocery business and when salesmen came to see him about business, would run them out of the store, and would curse and swear at customers without any reason; who accused his son and mother of robbing him without the slightest justification therefor, and who cursed and swore at his mother while she was on her death bed, and also in the cemetery while her body was being buried; who kept crying and mumbling to himself and threatened to kill himself and that although possessed of an estate of approximately \$50,000.00, refused to have a doctor when ill; and who accused his children of trying to poison him because they brought kosher meat and bread for him and their mother; and who, when he died, left a paper writing purporting to be his last will in which he said that his children

40 had shown ‘an utter lack of filial love and affection, and a total want of tenderness for their parents in their hours of labor and distress. Not only have they refused to lend help and assistance to their parents in the preservation of their home and in the accumulation of this estate, but they have consistently hindered, obstructed and embarrassed them in the same. They have heaped abuse upon their parents by their incivility, and in numerous ways and by divers means have ill-treated and dishonored them. They have failed to accord to their father and mother the respect and veneration that was their due. They have hurt and injured, particularly my son, David, their disordered and ailing mother and have denounced and villified their aged father. They have lightly esteemed the fatherly advice that has been bestowed

upon them and have wasted the substance that was provided for their progress and advancement. None of them has in anywise attempted to reconcile themselves with me, their father, nor shown for their declining mother any sense of compassion or sentiment. By their several ways and means they have broken my health and spirit, and it is meet and proper that I should provide for them from my bounty after my demise in proportion as they have afflicted me during my life,' and supposing that these things were untrue and that this man was excitable and irritable and understood the English language but little, and could not write or read; and that he refused to take in his home to spend the night, his mother, who was approximately 86 years of age, but allowed her to sit on the side porch of his house at about 10:30 P. M. without a place to go altho he had room in his house; and who could not discuss current events; and upon his death, although having four children, who were respectful and obedient, he left them, in what purported to be his last will the sum of \$1.00 each, and after the death of his wife, all his estate to charity, although during his lifetime he gave nothing to charity, and, who, in the purported will and codicil, attempted to bequeath to a museum a certain scroll of sacred significance to those of Jewish race, although some 20 years
41 before, he had already donated said scroll to his church; and who died within two years from the execution of this alleged will, from coronary thrombosis.

"In your opinion, Doctor, assuming these facts to be as I have said, would you say that a person exhibiting the symptoms related to was of sound or unsound mind?"

Said hypothetical question was objected to by counsel for caveatees upon the ground that there was no legally sufficient evidence as to the cause of death of Benjamin Berman, and therefore no foundation for the statement in the hypothetical question that the cause of death of said decedent was coronary thrombosis. But said objection was overruled, to which ruling exception was reserved by and allowed to counsel for caveatee. In answer to said hypothetical question, witness said that in his opinion decedent was of unsound mind. Witness also said that coronary thrombosis was heart disease.

Upon cross-examination of said witness, counsel for caveatee asked him to assume that during the years 1927 and 1928 said Benjamin Berman was not at all times of unsound mind, but upon occasions was of sound mind, and knew and understood what was going on around him and what was said to him; and asked said witness whether or not, assuming the facts stated in his cross question to be true, the same would affect the opinion of the witness as to whether said Benjamin Berman was capable of executing the will and codicil in litigation. Counsel for caveators objected to the question aforesaid, upon the ground that it was beyond the scope of the direct-examination, and also, that there was no evidence that he was of sound mind during this period and the question assumed such evidence had been introduced and further on the ground that the question as framed was not fair in view of the testimony. The Court sustained said objection upon the ground that it called for evidence beyond the scope of the direct-examination, to which ruling counsel for caveatee prayed an exception, which was then and there allowed and noted by the Court. And counsel for caveatee

42 then and there inquired of the Court whether the Court held by the ruling aforesaid that counsel for caveatee could not, on cross-examination of said expert witness, ask the witness to assume any matter of fact not included in the hypothetical question as propounded on direct-examination, to which inquiry the Court replied that he did rule that said witness could not be interrogated on cross-examination as to any fact beyond the scope of the direct-examination, to which ruling counsel for caveatee excepted and said exception was noted and allowed by the Court.

Counsel for caveators having rested their case in chief, counsel for caveatee called as a witness **Dr. Samuel Benjamin**, who testified that he was a qualified physician practicing in the District of Columbia, and had attended the late Benjamin Berman in his last illness for about three weeks prior to his death; saw said Berman sometimes two and sometimes three times a day and talked with him at the time of his visits. Thereupon counsel for caveatee asked the witness if he had formed an opinion as to the mental condition of the said Benjamin Berman, to which

question counsel for caveators objected on the ground that the witness was incompetent to testify to said opinion under Sec. 1073 of the Code of the District of Columbia, which objection was sustained by the Court, to which ruling counsel for caveatee duly excepted, and which exception was allowed and noted by the Court.

Dr. D. Percy Hickling, when called as a witness for the caveatee, testified that coronary thrombosis was heart disease; that it is a symptom of arterial hardening; that arterial hardening does not affect the mind unless there is hardening of a brain artery; that all persons beyond 50 years of age have more or less arterial hardening, and that this does not involve mental disturbance unless it occurs in a brain artery.

Upon the conclusion of all the evidence, counsel for caveators withdrew from the consideration of the jury issues Nos. 4, 5, 7 and 8.

The foregoing is in substance all of the proceedings and testimony in the trial of the issues herein relevant and pertinent to the exceptions hereinbefore mentioned, and inasmuch as each of said exceptions was duly noted and allowed before the jury retired to consider of its verdict, and because the same are not matters of record, and
43 in order that the same may be made of record, and that caveatee may have said exceptions reviewed on appeal, he moves the Court to sign and seal this, his bill of exceptions, and order the same of record, to have the same force and effect as if each of said exceptions had been embodied in a separate bill of exceptions, which is accordingly done now, for then, this 7th day of June, 1931.

By the Court:

— — —, [SEAL.]
Justice.

This cause having been heard before Mr. Justice Frederick L. Siddons who died before the settling and signing of the foregoing bill of exceptions the same is now settled and signed by Mr. Justice Jennings Bailey acting in his stead.

JENNINGS BAILEY,
Justice.

Counsel for the caveators note an exception, which was allowed by the court, to the inclusion of the first paragraph on page 15 in the Bill of Exceptions on the ground that the affidavits filed herein clearly show that the late Mr. Justice Siddons, the trial Justice, had ordered this paragraph stricken out.

JENNINGS BAILEY,
Justice.

44 [Endorsed:] Administration No. 39076. In re Estate of Benjamin Berman, deceased. Caveatee's bill of exceptions. P. H. Marshall and Richard Wellford, Washington, D. C., Attorneys for Caveatee. Filed May 14, 1931. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

Endorsed on cover: District of Columbia Supreme Court. No. 5462. William H. Labofish, executor, appellant, vs. Samuel Louis Berman et al. Court of Appeals, District of Columbia. Filed Jul. 27, 1931. Henry W. Hodges, Clerk.

OCT 5 - 1931

Henry W. Hodges

CLERK

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1931

— — —
No. 5462
Special Calendar
— — —

WILLIAM H. LABOFISH, EXECUTOR,
APPELLANT,

vs.

SAMUEL LOUIS BERMAN, ET AL.

— — —
BRIEF FOR APPELLANT.
— — —

P. H. MARSHALL,
R. E. WELLFORD,
Attorneys for Appellant.

TOPICAL INDEX

	Page
Statement of Case.....	1
Assignments of Error.....	5
Argument.....	5
Sub-Topics:	
Admission of Death Certificate.....	25
Denial of Right to Cross Examine.....	26

INDEX OF CASES

Beglin <i>vs.</i> Met. Life Ins. Co. 173 N. Y. 374.....	11
Bozicericle <i>vs.</i> Kenilworth Co., 199 Pac. 406.....	15
Brotherhood of Painters Etc. <i>vs.</i> Barton et al, 46 Ind. App. 160.....	13
Buffalo Loan Trust & Safe Dep. Co. <i>vs.</i> Knights Templar and Masonic Mutual Aid Assn., 126 N. Y. Rep. 458.....	11
22 Corpus Juris, page 724, Cross Examination of an Expert.....	20
Court of Honor <i>vs.</i> Clark, 125 Ill. App. 492.....	15
Davis <i>vs.</i> Supreme Lodge Knights of Honor, 58 N. E. 891.....	12
D. C. <i>vs.</i> Washington, 44 App. D. C. 120.....	8
Denver <i>vs.</i> R. R. Co., 100 Fed. 754.....	19
Dunagan <i>vs.</i> Power Co., 33 Fed. 876.....	19
Horton <i>vs.</i> U. S., 53 App. D. C. 310.....	18
Jones on Evidence, Par. 389, Page 588, Cross-exam- ination of Experts—Latitude Allowed.....	18
Kerr <i>vs.</i> Lunsford, 31 West Va. 659.....	19
Levy <i>vs.</i> Vaughan, 42 App. D. C. 146.....	8, 17
Lewson on Expert and Opinion Evidence, Page 222	20
Louisville R. R. Co. <i>vs.</i> Taylor (Kentucky), 27 L. R. A., N. S. 176.....	9
Omaha <i>vs.</i> R. R. Co. <i>vs.</i> Johnson, 109 Neb. 529.....	10

	Page
<i>Painton vs. Cavanaugh</i> , 135 N. Y. Sup. 418.....	8
<i>Pence vs. Myers</i> , 180 Ind. 282.....	13
<i>Prigg vs. Lansburgh</i> , 5 App. D. C. 30.....	8
<i>Rohloff vs. Aid Assn.</i> , 130 Wis. 61.....	15
11 Ruling Case Law, Page 580, on Hypothetical Questions.....	19
<i>Rush vs. McGee</i> , 36 Ind. 77.....	21
<i>Sanberg vs. State</i> , 113 Wis. 578.....	15
<i>Shamlan vs. Accident Co.</i> , 226 Mass. 67.....	15
<i>Snell vs. U. S.</i> , 16 App. D. C. 501.....	18
<i>Sovereign Camp vs. Grandon</i> , 64 Neb. 39.....	14
<i>State vs. McDonald</i> , 55 Or. 419.....	15
Statutes and Health Regulations.....	6, 7
<i>Swensen vs. Bender</i> , 114 Fed. 1.....	19
<i>Thompson vs. Seattle R. Co.</i> , 71 Wash. 436.....	15
Wigmore on Evidence, Vol. 1, Sec. 684, Page 1094, Cross-examination of Experts.....	19
<i>Woodward vs. R. R. Co.</i> , 122 Fed. 66.....	19

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1931

No. 5462

SPECIAL CALENDAR

WILLIAM H. LABOFISH, EXECUTOR, *Appellant*,

vs.

SAMUEL LOUIS BERMAN, ET AL.

BRIEF OF APPELLANT.

Statement of the Case.

Petition for probate of the last will and testament, and codicil thereto, of Benjamin Berman, deceased, was filed in the Supreme Court of the District of Columbia, holding Probate Court, on June 28, 1929 (R. 1-3). To said petition caveat was filed (R. 3-5), and thereafter, an order framing issues was signed, which issues, in substance, attacked the validity of said will and codicil upon the grounds of lack of requisite formalities in their execution, undue influence, fraud or duress, and lack of testamentary capacity (R. 7-8).

During the trial of the cause the issues as to formal execution, and fraud or duress, were withdrawn, as were likewise certain issues numbered 7 and 8, and raising immaterial questions (R. 8).

Upon the issue of undue influence the verdict was directed for caveatee, so that the case was submitted to the jury upon but one issue, namely, that of testamentary capacity.

Upon this issue the jury found for caveators, and this appeal is prosecuted from the order of the Court denying probate to the will and codicil aforesaid (R. 15-17).

During the trial of the cause counsel for caveators produced and offered in evidence for the purpose of proving the cause of death of said Benjamin Berman a certain document certified by the Assistant Health Officer of the District of Columbia to be a true and correct copy of a certificate of death on file in the Health Department of the District of Columbia, and duly recorded in the records of said Health Department, in which said copy, the original whereof purported to have been made by Dr. Samuel Benjamin, the attending physician, the cause of death of said Benjamin Berman was stated to be Coronary Thrombosis (R. 29-30). The offer in evidence of the paper aforesaid was objected to by counsel for caveatee, upon the grounds that said certificate was hearsay; was not within any of the exceptions to the hearsay rule; because the physician who appeared to have signed the said certificate could not be examined as a witness, and because his testimony was inadmissible by virtue of the provisions of Section 1073 of the District Code. Said objection was overruled and the certificate admitted in evidence, to which action of the Court exception was duly reserved (R. 28).

Dr. John P. H. Murphy was called as an expert witness on behalf of caveators, and examined upon a hypothetical question as to his opinion concerning the soundness or unsoundness of mind of said Benjamin Berman, and among the facts which said expert was asked to assume as true, and as furnishing the foundation for his expert opinion, was that said Benjamin Berman died from Coronary Thrombosis (R. 33). Said hypothetical question was objected to by counsel for caveatee upon the ground that there was no legally sufficient evidence as to the cause of death of Benjamin Berman, and therefore no foundation for the statement in the hypothetical question that the cause of his death was Coronary Thrombosis (R. 33); and the record discloses that the only testimony admitted concerning the cause of death of said decedent was the statement contained in the copy of the death certificate admitted over the objection as aforesaid. The Court overruled said objection to the hypothetical question, to which ruling exception was duly reserved, and the expert witness stated in answer to said hypothetical question that in his opinion decedent was of unsound mind (R. 33).

Upon the cross-examination of said expert, he was asked to assume that during the years 1927 and 1928 (decedent's will was executed September 26, 1927, and the codicil thereto September 17, 1928) (R. 26; R. 27), said Berman was not at all times of unsound mind, but upon occasions was of sound mind, and knew and understood what was going on around him and what was said to him; and cross-examining counsel asked said expert witness whether or not, assuming the facts aforesaid to be true, the same would affect the opinion of the witness as to whether said Berman was capable of executing the will and codicil in litigation (R. 34).

On cross-examination of two of the caveators, who were sons of decedent, and of a daughter-in-law of decedent, each had testified that during the years 1927 and 1928 decedent was at times of sound mind, and knew and understood what was going on around him and what was said to him, and at other times he was not and did not (R. 31). Caveators objected to said cross-examination of their expert, upon the grounds that it was beyond the scope of the direct-examination, and also that there was no evidence that he was of sound mind during such period, and that the cross-question assumed that such evidence had been introduced; and also upon the ground that the question as framed was not fair in view of the testimony. The Court sustained this objection upon the ground that it called for evidence beyond the scope of the direct examination, to which ruling counsel for caveatee duly excepted, and also inquired of the Court whether by the ruling aforesaid counsel for caveatee could not, on cross-examination of said expert, ask the witness to assume any matter of fact not included in the hypothetical question as propounded on direct examination, to which inquiry the Court replied that he did rule that said witness could not be interrogated on cross-examination as to any fact beyond the scope of the direct examination, to which ruling counsel for caveatee also excepted (R. 34).

Counsel for caveatee called as a witness Dr. Samuel Benjamin, whose name appears as attending physician in the copy of certificate of death received in evidence as aforesaid, and who testified that he had attended said Berman in his last illness for about three weeks prior to his death, and saw him sometimes two and sometimes three times a day and talked with him at the times of his visits. Counsel for caveatee asked this

witness if he had formed an opinion as to the mental condition of the said Benjamin Berman, which question was objected to on the ground that the witness was incompetent to testify under Section 1073 of the Code, which objection was sustained, and exception duly noted and allowed (R. 34-35).

Assignments of Error.

The trial Court committed error as follows:

1. In admitting in evidence, over the objection and exception of counsel for caveatee, the death certificate of Benjamin Berman.

2. In overruling objection to the hypothetical question propounded to Dr. John P. H. Murphy on his direct examination, which objection was upon the ground that there was no legally sufficient evidence as to the cause of death of Benjamin Berman.

3. In sustaining the objection to cross-examination of Dr. John P. H. Murphy as to matters not included in the hypothetical question asked said witness on his direct-examination, but testified to by certain of the caveators.

4. In sustaining the objection of counsel for caveators to permitting Dr. Samuel Benjamin to testify as to his contacts with, and observations of Benjamin Berman, deceased, and as to witness's opinion as to the mental condition of said Benjamin Berman.

Argument.

Assignments of error numbered 1, 2 and 4 deal with the rulings of the trial Court concerning the admission in evidence of the certified copy of the death certificate of Benjamin Berman, together with the refusal of the

trial Court to receive testimony from the attending physician, notwithstanding the admission in evidence, by way of certificate, of the statement of said attending physician as to the cause of death. We believe these assignments can be considered together.

We submit as a correct proposition of law that under the rules of evidence, considered in connection with Sec. 1073 of the District Code, the certified copy of the death certificate was hearsay, and should have been excluded. We further submit that the statutes and regulations authorizing and requiring such certificates are designed to promote the collection of vital statistics for the public benefit, but were not intended to change the established rules of evidence in controversies between individuals.

The statutes and health regulations applicable in the case at bar are as follows:

“That the Commissioners of the District of Columbia be, and they are hereby authorized and directed to collect a fee of 50 cents to be paid to the Collector of Taxes, and by him to be deposited in the United States Treasury to the credit of the District of Columbia, for each transcript from the record of burials, deaths and marriages in the health department of said district. *Health Department—Health Officer*, page 267, Sec. 981, New Code of the District of Columbia.

“The Commissioners of the District of Columbia shall appoint a physician as health officer whose duty it shall be, under the direction of said commissioners, to execute and enforce all laws and regulations relating to public health and vital statistics.

“Sec. 982. It shall be the duty of the Health Officer of the District of Columbia to enforce regulations to secure a full and correct record of vital

statistics, *including the registration of deaths and the interment of dead in said District.*

“Page 268, Sec. 991. The ordinances, rules and regulations of said late Board of Health contained in the report mentioned in Sec. 990 of this title and printed in said Executive Document therein mentioned, namely * * * Eighth: regulations to secure a full and correct record of *vital statistics* including the registration of marriages, *births and deaths*, the interment, disinterment and removal of the dead in the District of Columbia, are hereby legalized and made valid, and the penalties therein provided respectively for the violation thereof, may be imposed and enforced for the violation of the same respectively, as provided in Sec. 77 of the Ordinances passed November 19, 1875.”

(Italics ours.)

It is significant that in the statutory requirements as to the birth certificates, it is provided that such certificates “shall be a part of the official record of such births” (Page 268, Sec. 1001, New District of Columbia Code); that Sec. 1103 provides that reports of births shall “be a part of the public records of said District,” and that any person having an interest in any particular matter contained, or reasonably to be contained therein, shall be permitted to inspect such certificates and records during all reasonable hours, without charge. No such provisions are contained in the enactments relating to death certificates.

The laws and regulations as to death certificates show plainly that they are required for a statistical purpose, and there is absolutely no legislation in this district indicating an intention to modify Sec. 1073 of the Code, relating to the testimony of physicians, so as to make the statements of attending physicians

in such certificates receivable in evidence, or an exception to said section of the Code.

In *Levy vs. Vaughan*, 42 App. D. C. 146, this Court, speaking of a death certificate, said:

“Its apparent purpose is to furnish statistical information.”

In *Prigg vs. Lansburgh*, 5 App. D. C. 30, the Court was considering the admissibility of an entry in the complaint book at Police Headquarters, and in the course of the opinion, Mr. Justice Shepherd said:

“The statute does not in express terms authorize the admission of the record as proof of the facts contained in it. * * * Had the record been offered and admitted as prima facie evidence, the Court must necessarily have instructed the jury to disregard it insofar as it concerned the defendants then before the Court, upon its being made to appear that the record had been made by a third person in their absence.”

In *D. C. vs. Washington*, 44 App. D. C. 120, this Court held that a death certificate was not admissible for the purpose of proving the cause of death.

Painton vs. Cavanaugh, 135 N. Y. Sup. 418. In this case the action was to determine the validity of a will. The Court said:

“Furthermore, upon the trial the plaintiff offered in evidence an authenticated certificate from the Health Department of the City of Troy stating the name, age, place of death and cause of death of Patrick Cavanaugh, to the admission of which defendant’s attorney objected upon the ground that such evidence was incompetent, improper, inadmissible and hearsay, and that the

statements therein as to the cause of death could not properly be received in evidence, which objection was overruled and the defendant duly excepted. This certificate stated 'chief cause of death, arterio fibrosis,' 'other causes, apoplexy,' and was the only evidence offered at the trial as to the causes of death. Embraced in the hypothetical question asked by plaintiff's attorney of the medical experts called by him was the cause of death as so stated in such certificate, to which question objection was specifically made that 'there is no legal proof of the cause of death,' which objection was overruled, exception taken and the question answered. Evidently the certificate of death was offered for the purpose of proving the causes of death to have been arterio fibrosis and apoplexy. It was inadmissible for that purpose. *Beglin vs. Met. Life Ins. Co.*, 173 N. Y. 374. As the question at issue was the mental condition of Patrick Cavanaugh, this proof as to the cause of his death doubtless had an important bearing with the jury. One of the medical experts called by plaintiff testified that in answering the hypothetical question he took into consideration all the facts therein stated and based his opinion absolutely on those facts. No citation of authority is necessary to the effect that a hypothetical question can be founded upon legal evidence only."

The foregoing decision is so four-square with the case at bar as to bring about one of those unusual situations in which a learned opinion by an authoritative tribunal exactly fits the facts and circumstances of another and later case.

In *Louisville R. R. Co. v. Taylor* (Kentucky, 27 L. R. A. N. S. 176, which was an action for causing the

death of plaintiff's intestate by negligence, the Court said:

“The defendant offered in evidence a copy of the death certificate made by the attending physician, Dr. Roberts, showing the cause of the death of decedent. It showed he died of tuberculosis. The Court properly refused to allow the certificate to be read in evidence, it not appearing that Dr. Roberts is dead. * * * While the statute requires the physician to give the death certificate, there is nothing in the statute making the certificate evidence in judicial proceedings, and it stands entirely on a different plane from the return of an officer made pursuant to law under his official oath.”

In *Omaha R. R. Co. vs. Johnson*, 109 Neb. 529, an action to recover compensation under the Workmen's Compensation Act, the Court said:

“The defendant, on the other hand, introduced over objection, the medical certificate of death made out in accordance with the provisions of our statute by the decedent's physician last in attendance, which certificate by the statute is required to disclose the cause of death and must be filed before a burial permit can be issued. And by this certificate the defendant attempted to show by the recitals therein, that the cause of death was one entirely distinct and apart from the injuries. Such a certificate, however, though filed publicly with the Registrar is not a public record entitled to be introduced as independent evidence in such a case as this is. It is filled out by the attending physician in an ex parte manner, without a hearing, and without the right of parties interested to cross-examine. In a controversy between individuals, where the cause of death is a material issue, such certificate has no direct evidentiary value on that

issue, and its recitals must be disregarded by this Court.” (Citing authorities.)

Buffalo Loan Trust & Safe Dep. Co. vs. Knights Templar and Masonic Mutual Aid Assn., 126 N. Y. Rep. 458. In this case the statutes and regulations concerning death certificates are practically identical with those in force in this district, and the Court held such statutes and ordinances to be police regulations, and that the records were required for local and specific purposes, and were not public records in such sense as to make them evidence between private parties of the facts recorded.

“We have found no cause which would justify their admission in a controversy between private parties as evidence of the cause of death recently happening, when that becomes a material inquiry.”

In Beglin vs. Met. Life Ins. Co., 173 N. Y. Rep. 374, the Court said:

“The question appears to have arisen in the Court below as to whether the general statute relating to public health was in force in the City of Albany, or Chapter 297 of the laws of 1885, which was a broad statute. We shall not stop to consider that question, but shall assume that the general statute was in force, and that it required the registration of births, marriages and deaths, including the cause of death; and that this record was made prima facie evidence of the facts therein set forth. The statute was a police regulation, required for public purposes, and became prima facie evidence so far as concerns questions arising under its provisions which involve public rights. But we think it was not the intention of the legislature to change the common law rule of evidence in controversies of private parties grow-

ing out of contract, and that the provisions of the statute should not be construed as applicable to such cases.” (Citing authorities.)

Davis vs. Supreme Lodge Knights of Honor, 58 N. E. 891. In this case the Court said that the question involved was the right of defendant’s counsel to prove by the certificate of the physician in attendance during the last illness of the deceased’s aunts, the cause of death, or the particular diseases, from which they died”; that it was admitted that the physician had no knowledge on that subject except such as he acquired in his professional capacity; the testimony of this character was expressly prohibited by Sec. 834 of the (New York) Code.

“That the proof offered and excluded was inadmissible, I may assume to be a proposition too clear for argument, unless the prohibition contained in the section of the Code referred to has been repealed. This Court has ruled that the statement of the attending physician for the purpose of establishing the cause of death, either of the insured himself or of his ancestors or their descendants, although not parties to or beneficiaries under the contract, were not admissible.
* * *

“The form in which the statements are sought to be introduced is of no consequence, whether as a witness on the witness stand or through the medium of an affidavit or certificate. * * * By reasonable construction, it excludes a physician from giving testimony in a judicial proceeding in any form, whether by affidavit or oral examination involving the disclosure of confidential information acquired in attending a patient, unless the seal of secrecy is removed by the patient himself.”

In *Pence vs. Myers*, 180 Ind. 282, which was a contest of the last will and testament of the father of plaintiff's, the lower Court had admitted in evidence, over objection, certain records kept by the Health Officer in the County where the deceased lived. The Appellate Court held the admission of such records to be error and said:

“Appellee (plaintiff below) offered in evidence a record copy of the Health Officer of Grant County, which record was prepared from the physician's death certificate, and in addition to certain personal statistics relative to the deceased, contained the date and cause of his death. * * * The admission of this record was error. It is well established that in a will contest, a physician attending on a testator at the time of his death should not be permitted to give testimony tending to strike down the will as to the condition of the testator's mind or as to the disease from which he suffered, the cause or duration of his illness, and the cause of his death, unless the objection thereto is waived by him who stands in the place of the decedent (Citing a great number of Indiana cases). In the absence of statutory provision, therefore, it is equally true that the death certificate of such physician, or a health record alleged to be based thereon and showing the above facts or any of them, is incompetent in such a case, being hearsay testimony as to facts or statements not directly admissible because of their privileged character.”

The same principle was also decided in *Brotherhood of Painters, etc., vs. Barton et al.*, 46 Ind. App. 160, in which the Court said:

“The public is interested in tabulated vital statistics, which, as a rule, may be approximately correct. The rights of the public by this wholesome

law are subserved when they have the benefit of the facts collected under its provisions, but no public interest is promoted when the use of such data is to prevent or retard, contrary to the established rules of evidence, the assertion of private rights between individuals in which the public has no concern."

In *Sovereign Camp vs. Grandon*, 64 Neb. 39, the Court, in passing upon the admissibility of a death certificate, said:

"It is a mere police regulation, and is not intended for the purpose of supplying the public at large with information upon which reliance may be placed in the business affairs of the community. We do not think the record is of such character as to entitle it to be received in evidence as affecting the interests of a party to the litigation. * * * If signed by a physician, it contains matter relating to his patient which a physician is not allowed to disclose as a witness upon the trial against the objection of his patient or those representing him. That a record of this character reciting privileged communications may be used against the party where the testimony of the physician making it could not be received is a proposition so inconsistent with reason and natural rules of justice that we cannot give our consent thereto."

We ask the attention of the Court to the fact that although the Court below admitted in evidence the certificate of Dr. Samuel Benjamin, it refused to permit him to testify as a witness on behalf of the caveatee, and we have the situation, which we submit is "inconsistent with reason and natural rules of justice" referred to in the preceding citation, that the testimony of Dr. Benjamin as to the cause of death was gotten before the jury as it appeared upon the piece of paper

to which we objected, but that his testimony in person under oath was refused by the Court below upon the objection that he could not testify because of the provisions of Section 1073 of the Code. To the same effect see *Rohloff vs. Aid Association*, 130 Wis. 161, and *Court of Honor vs. Clark*, 125 Ill. App. 492, in which latter case the Court said:

“While the statute may require every physician to report the death of his patients to the State Board of Health, yet such report could not in itself be evidence in this suit over the objection of appellee. Such a certificate is not of a judicial character.”

While cases can be found in which death certificates have been received in evidence, our examination of these cases, and of the statutes, has disclosed that said statutes not only provide for the issuance of certified copies of such death certificates, but also that such copies shall be prima facie evidence of the facts therein set forth. We have no such statute in this district.

We have found such statutes in force in Utah (*Bozicericle vs. Kenilworth Co.*, 199 Pac. 406); in Massachusetts (*Shamlan vs. Accident Co.*, 226 Mass. 67); in Oregon (*State vs. McDonald*, 55 Or. 419); in Washington (*Thompson vs. Seattle R. Co.*, 71 Wash. 436); in Wisconsin (*Sanberg vs. State*, 113 Wis. 578).

We respectfully submit that we have maintained by the foregoing authorities, including the previous decisions of this Court; the validity of our exceptions dealing with the admission in evidence of the copy of the death certificate of Benjamin Berman, with our objection to the hypothetical question upon the ground that it contained no legally sufficient evidence of the cause of his death, and that by refusing to permit the at-

tending physician to testify as our witness, the trial Court made even more apparent the inconsistency of a ruling which, in effect, permitted Dr. Samuel Benjamin to testify through the medium of an ex parte statement contained in a piece of paper, while denying him the privilege of testifying before the jury under oath.

Limitation of Cross-examination of Dr. Murphy.

On the cross-examination of this expert witness for caveators, counsel for caveatee sought to have the expert assume additional facts to those included in the hypothetical question asked the witness on direct examination (R. 34), which additional facts had been testified to on cross-examination by two of the caveators and a witness called on their behalf (R. 32). The Court sustained an objection to such cross-examination, and ruled, in response to a question by counsel for caveatee, that the witness could not be asked on cross-examination as to any fact beyond the scope of the direct examination, to which exception was duly reserved, and is presented under our third assignment of error.

We asked the attention of the Court to the fact that Dr. Murphy was examined as an expert solely for the purpose of eliciting an opinion from him that Benjamin Berman was of unsound mind, and that his direct examination was entirely for this purpose. Any question asked this witness on cross-examination, his answer to which would have reflected any light upon the mental condition of Benjamin Berman and his capacity to make the will and codicil in issue, necessarily was within the scope of the direct examination of said witness, but by sustaining the objection of counsel for caveators, the Court directly held that the excluded

question was beyond the scope of the direct examination, and it is difficult to see what questions consistent with this ruling could have been propounded on cross-examination, except questions limited entirely to the facts which the witness was asked to assume as correct on direct examination. We believe that this violated the fundamental rule as to cross-examination of an expert, and it requires no argument to demonstrate the handicap which this ruling imposed upon counsel for caveatee, amounting, in effect, to a denial of the right of any adequate cross-examination at all.

In *Levy vs. Vaughan*, 42 App. D. C. 146 (previously cited herein upon another point), this Court had before it an assignment of error concerning a hypothetical question addressed to several surgeons who had testified for the defendant. It was contended that the omission from this hypothetical question of certain testimony given by the wife of the deceased, as to choking sensations occurring at times when deceased was sleeping, rendered the hypothetical question objectionable, but upon this contention this Court said:

“The record shows that these choking sensations were included in the cross-examination of at least two of the surgeon experts; *they might have been included in that of the others also.*” (Italics ours.)

By this ruling, this Court has approved of the established practice of permitting opposing counsel on cross-examination to ask the expert to assume facts not included in the hypothetical question as originally propounded, and has said that failure to do this renders ineffective an objection to the hypothetical question upon the ground that such additional facts were not included therein, which was just exactly what coun-

sel for caveatee attempted to do, and was prevented from doing by the trial Court in the case at bar.

In *Horton vs. U. S.*, ~~53~~⁴⁵ App. D. C. 310, this Court said (page 325):

“The question embraces the substantial facts as offered by the Government, and if there are any facts that the defendant thinks are material and might affect the witness’s opinion, that is a matter which he can test on cross-examination.”

In the case of *Snell vs. U. S.*, 16 App. D. C. 501, this Court in speaking of hypothetical questions said (page 518):

“But suppose the hypothesis of the question put on cross-examination was not strictly founded upon the facts in proof, but in some respects varied therefrom, it would not follow that there was error in allowing such question to be put to an expert witness. For the rule is well settled that experts may be cross-examined on purely abstract questions, assuming facts and theories that are not based on the special evidence of the particular case.”

Jones on Evidence, paragraph 389, page 588:

“Cross-examination of Experts—Latitude Allowed.—The party cross-examining an expert witness is by no means confined to the theory on which the adversary has conducted his examination. He may go into the details and may put the case before the expert in all its phases. ‘He has a right to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved; and he also has the right to add to the question such facts as he thinks the evidence establishes.’ The witness may be asked his opinion upon hypothetical questions

which present the facts claimed to constitute the case or defense of the party examining him. As usual in cross-examination great liberty is allowed; and the hypothetical questions may, subject to the reasonable discretion of the court, assume any facts relevant to the case.”

In *Wigmore on Evidence*, Volume I, section 684, page 1094, the author states the rule concerning cross-examination of experts as follows:

“Just as a cross-examination of an ordinary witness may involve questions which test his memory, observation and bias, so in cross-examining one who takes the stand as a skilled witness, his judgment upon germaine matters may be tested by assuming a premises and asking his conclusions. The modes and purposes are substantially the same as in testing ordinary witnesses.”

In *Dunagan vs. Power Co.*, 33 Fed. (2nd) 876, decided July 1, 1929, Mr. Justice Parker said:

“In the second place, it is no objection to the testimony of an expert that it is based upon facts as contended by one of the parties; for the other party by cross-examination may show that other facts deemed pertinent have not been considered, or that consideration of such other facts would alter his opinion.”

Citing *Denver vs. R. R. Co.*, 100 Fed. 754; *Swenson vs. Bender*, 114 Fed. 1; *Woodward vs. R. R. Co.*, 122 Fed. 66; *Kerr vs. Lunsford*, 31 West Va. 659.

Petition for a writ of certiorari to the Supreme Court of the United States was denied in the *Dunagan* case on June 6, 1930.

In 11 *Ruling Case Law*, page 580, the following rule is laid down:

“But it (the hypothetical question) must embody substantially all the facts relating to the

particular matter as to which an expert opinion is sought to be elicited, which in some cases, especially where the issue is insanity, may include virtually all the facts in the case, and the trial court should exclude it if it selects or presents the facts unfairly, or omits essential facts which are admitted or rendered practically certain by the evidence. If the opposing counsel thinks that facts are omitted from the question which are essential to forming a conclusion, his remedy is to put those additional facts before the witness on cross-examination."

In 22 *Corpus Juris*, page 724, under the heading "Cross-examination of an Expert" the following rule is laid down:

"The attention of an expert witness may be called to any fact omitted from the hypothetical question asked him on direct examination, or the facts stated in the hypothetical question which are deemed unimportant may be sifted out. The requirement that hypothetical question shall be based upon the evidence is not usually applied with strictness to questions asked upon cross-examination for the purpose of testing witness' confidence in his own opinion, but the court may permit cross-examination on purely imaginary or abstract questions, assuming facts and theories not in evidence, if the office and purpose of the examination is to elicit the reason upon which the expert based the opinion expressed by him on examination in chief, or to ascertain the extent of his learning and knowledge of the particular subject upon which he assumes to be an expert. * * * *THE EXPERT MAY BE ASKED WHAT HIS OPINION WOULD BE ASSUMING THE FACTS TO BE AS THE CROSS-EXAMINING COUNSEL CLAIMS THAT THE EVIDENCE SHOWS THEM TO BE.*

“It is not essential that a question asked an expert on cross-examination should be framed with strict regard to the usual form of hypothetical question. A cross-examining counsel is entitled to bring out any fact permitted by the general scope of cross-examination, which is relevant or in issue, including that of damages.”

See also *Rush vs. McGee*, 36 Ind. 77.

In *Lewson on Expert and Opinion Evidence*, page 222, the following rule is laid down:

“Counsel in framing hypothetical cases to be put to expert witnesses are not confined to facts admitted or absolutely proved, but facts may be assumed which there is evidence on either side tending to establish, and which are pertinent to the theories which they are attempting to uphold.”

We confidently assert that the authorities which we have brought to the attention of this Court in the enclosed brief are conclusive to the effect that the trial Court committed reversible error in the case at bar, and that the assignments of error, supported by the exceptions herein discussed, and the authorities which we have cited, demonstrate that the errors committed were prejudicial to the caveatee, and that he is entitled to have the action of the Court below in denying probate of the will and codicil in issue set aside, and a new trial ordered of the issues submitted to and decided by the jury.

Respectfully submitted,

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